

## OFFICE OF ADMINISTRATIVE LAW

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DEBRA M. CORNEZ  
Director

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*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: January 24, 2013

To: Willie Stephens

From: Chapter Two Compliance Unit

Subject: **2013 OAL DETERMINATION NO. 1(S)**  
**(CTU2012-1126-05)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum titled  
"Elimination of Inmate Holiday Pay and Work-Related Injury Pay"

On November 26, 2012, Office of Administrative Law (OAL) received your petition asking for a determination as to whether a memorandum titled "Elimination of Inmate Holiday Pay and Work-Related Injury Pay" constitutes an underground regulation. The memorandum was issued on October 1, 2004, by the General Manager of the California Prison Industry Authority (CalPIA). The challenged rule is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

On October 1, 2004, CalPIA sent a memorandum to the wardens of California prisons stating:

Pursuant to Penal Code Section 2811, the Prison Industry Board (Board) on June 25, 2004 adopted the following changes to the Prison Industry Authority (PIA) Inmate Pay Plan: Effective January 3, 2005, PIA will no longer compensate prisoner employees for State holidays or time lost due to job-related illness or injury. In addition, the Board has directed PIA to apply all of the savings from the elimination of holiday, job-related injury

<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

<sup>2</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

pay to the expansion of inmate programming and pre-release support.

In 2010, inmate pay was determined by California Department of Corrections and Rehabilitation's Department Operations Manual (DOM) section 51121.5. DOM section 51121.5 is attached hereto as Exhibit B. In 2010, OAL determined that DOM section 51121.5 was an underground regulation. (See 2010 OAL Determination No. 7.) As a result of that determination, in April, 2012, CalPIA adopted California Code of Regulations, title 15, section 8006 which established inmate pay rates. The text of section 8006 is attached hereto as Exhibit C.

The rules governing the amount of inmate pay have, therefore, been adopted pursuant to the rulemaking provisions of the APA. California Code of Regulations, title 15, section 8006, requires that inmate compensation shall be paid "...in accord with the graduated pay schedule, and based on quality and quantity of work performed, and technical skills and abilities required for its performance." Section 8006 is a complete regulatory scheme for the payment of inmate compensation and does not include compensation for holiday pay or job-related illness or injury pay.

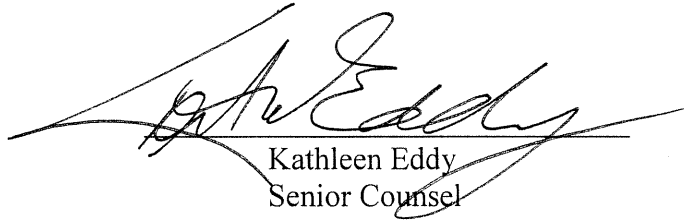
Furthermore, the adoption of a regulation pursuant to the rulemaking provisions of the APA that sets forth the requirements for inmate compensation, supersedes any previously issued rule or policy dealing with inmate compensation, including the 2004 memorandum you challenge as an underground regulation. If CalPIA chooses to change its policy on compensating inmates for holiday pay or job-related illness or injury pay, it will have to make such changes as a properly adopted regulation.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>3</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



Debra M. Cornez  
Director



Kathleen Eddy  
Senior Counsel

Copy: Charles Pattillo  
Ann Cunningham

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<sup>3</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

**(A) The challenged rule has been superseded.**

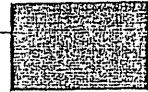
(B) The challenged rule is contained in a California statute.

**(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.**

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)

# Exhibit A



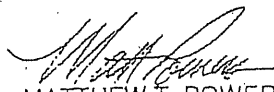
Date: October 1, 2004

To: Wardens  
Prison Industries Administrators/Lead Managers

From: Prison Industry Authority • 560 East Natoma Street • Folsom, California 95630-2200

Subject: ELIMINATION OF INMATE HOLIDAY PAY AND WORK-RELATED INJURY PAY

Pursuant to Penal Code Section 2811, the Prison Industry Board (Board) on June 25, 2004 adopted the following changes to the Prison Industry Authority (PIA) Inmate Pay Plan: Effective January 3, 2005, PIA will no longer compensate prisoner employees for State holidays or time lost due to job-related illness or injury. In addition, the Board has directed PIA to apply all of the savings from the elimination of holiday, job-related injury pay to the expansion of inmate programming and pre-release support.



MATTHEW T. POWERS  
General Manager

Attachment

cc: J. S. Woodford, Director, Department of Corrections

# Exhibit B

**51121.5 PIA Inmate Pay Schedules**

Hourly wage rates shall be approved by the PIB and published by the PIA.

All PIA inmate positions are to be assigned to one of the following levels:

**Hourly Pay Schedule**

<b>Title</b>	<b>Step I</b>	<b>Step II</b>	<b>Step III</b>
Leadperson (AA)	\$.75	\$.85	\$.95
Special Skills (A)	.65	.70	.75
Technician (B)	.55	.60	.65
Semi-Skill (C)	.45	.50	.55
Laborer (D)	.30	.35	.40

For each enterprise, the percentage of the inmate work force in each skill level shall not exceed the following:

Leadperson (AA)/Special Skills (A) 25 percent

Technician (B) 25 percent

Semi-Skill (C) 25 percent

Laborer (D) 25 percent

# Exhibit C



Title 15. Crime Prevention and Corrections

Division 8. California Prison Industry Authority

Chapter 1. Rules and Regulations of California Prison Industry Authority

Article 3. CALPIA Work and Training

**§ 8006. Inmate Pay Rates, Schedule and Movement.**

(a) Inmates assigned to work programs within CALPIA shall receive compensation as determined by the General Manager and reviewed by the Prison Industry Board (PIB). Compensation shall be paid from the Prison Industries Revolving Fund, and shall be in accord with the graduated pay schedule, and based on quality and quantity of work performed, and technical skills and abilities required for its performance.

(b) Any proposed changes to the Inmate Pay Schedule shall be submitted by the General Manager to the PIB for review.

(c) Final determination of any disputes or interpretations of the Inmate Pay Schedule shall be made by the General Manager.

(d) CALPIA inmate pay rates shall be in accord with the following skill and step levels:

(1) Inmate Pay Schedule:

<i>Skill Level</i>	<i>Step I</i>	<i>Step II</i>	<i>Step III</i>
Level 1			
Leadperson (AA)	\$.75	\$.85	\$.95
Level 2			
Special Skills (A)	.65	.70	.75
Level 3			
Technician (B)	.55	.60	.65
Level 4			
Semi-Skill (C)	.45	.50	.55
Level 5			
Laborer/Entry Trainee (D)	.30	.35	.40

(e) The Prison Industries Administrator/Lead Manager at each facility shall be responsible for the administration of the CALPIA inmate pay program, ensuring pay positions are properly classified and allocated.

(f) Movement between one pay rate to another pay rate shall be based upon the following:

(1) Pay increases. Increases shall not be automatic or solely based on the inmate's longevity in an assignment. Increases in the pay rate shall be based on the inmate's productivity (quantity and quality of work performed), the supervisor's recommendation, the inmate's work/training performance report, and shall be subject to the review and approval of the Prison Industries Administrator/Lead Manager.

(A) Inmates may receive a pay increase for satisfactory performance after they complete three months of work in each step level, as described in subsection (d)(1) above.

(B) Inmate pay increases from Step I to Step II and finally Step III shall be effective upon the Prison Industries Administrator/Lead Manager approval on the first day of the following month after the pay increase is administratively processed.

(2) Pay decreases. Reduction in pay shall be based on the immediate supervisor's recommendation, inmate's less than satisfactory work performance, or inmate misconduct as described in Title 15, California Code of Regulations (CCR), Division 3, Sections 3312, 3314, or 3315.

(A) Inmate pay decreases shall be effective upon the Prison Industries Administrator/Lead Manager review and approval on the first day of the following month after the pay decrease is administratively processed.

(3) Advancement. Inmates may advance to a higher skill level, as described in subsection (d)(1), with the immediate supervisor's recommendation and based upon the inmate's demonstration of increased skill level, their work/training performance report, and shall be subject to the review and approval of the Prison Industries Administrator/Lead Manager.

(A) Inmates may advance from one skill level to the next, after they complete one month of work in their current skill level, as described in subsection (d)(1) above.

(B) Inmate advancement shall be effective upon the Prison Administrator/Lead Manager approval on the first day of the following month after the pay increase is administratively processed.

(C) An inmate's longevity shall not be used as criteria for the purpose of upgrading skill level.

(4) Removal beyond inmate control. Inmates removed from their work assignment for reasons beyond their control, including, but not limited to out-to-court or lengthy hospital stay, may return to a CALPIA assignment at the same or closest level of pay to their former position, if a position is available, via the institution classification committee process, CCR, Title 15, Division 3, Section 3040.

Note: Authority cited: Sections 2801, 2808 and 2811, Penal Code. Reference: Sections 2806 and 2811, Penal Code.

## HISTORY

1. New section filed 3-8-2012; operative 4-7-2012 (Register 2012, No. 10).